ASSESSMENT OF DAMAGES WHERE PROPERTY HAS NO MARKET PRICE.—In a recent case in New York, where the defendant warehouseman converted the plaintiff's household goods, stored in the warehouse, the court sent the case back for a new trial, and in commenting upon the rule of damages there to be applied, said that the market value of the goods was not the test, but that the value to the owner based on his actual money loss was the measure of damages. *Lake* v. *Dye* (1921) 232 N. Y. 209, 133 N. E. 448.

The ordinary measure of damages for conversion is the market price of the goods at the time of conversion.[1] In this field of the law, damages are intended only as compensation,[2] *i. e.*, an amount sufficient to put the injured person in as good a position as if the act had not been done. If the property has a market value, the awarding of the price as damages is intended to enable the injured party to purchase goods identical in nature with the property converted, and thus put himself in the same position. But it is frequently true, as in the instant case, that the market price would not be a reliable means of determining what damages would so compensate. The secondhand value of household goods, for example, is so far below the cost price of new goods, that the owner, who perhaps cannot use or will not buy secondhand goods, is not fully compensated by the market price.[3] On the other hand, to give him the cost price of new goods does not take into consideration the depreciation due to the use of the goods, and is, therefore, not a correct measure of his loss.[4] Or, even where the market price is ordinarily used as a base for estimating damages, as in the case of a contract to sell a chattel, where the damages are the difference between the market price and the contract price, the market price may in a particular instance be unduly inflated, and, therefore, if used as a conclusive measure, would operate to give one of the parties an undue advantage.[5] Or, as frequently happens, the property may have no market value at all, as in the case of family portraits,[6] or a set of building plans.[7] In these cases the market price clearly cannot be utilized to determine what sum will compensate the plaintiff. In the last analysis, therefore, market price is nothing more than evidence of the amount to which the injured person is entitled.[8] If such evidence does not, for any reason, correctly indicate what amount will compensate, there should be no hesitancy in discarding it; this the courts have done. They have then been confronted with the problem as to what is the proper test.

The courts have variously declared the measure of damages to be the "actual value," "actual cash value," "actual value to the owner," or "intrinsic value."[9]

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[1] See *Whitehurst* v. *United States* (C. C. A. 1921) 272 Fed. 46, 48.

[2] Punitive and nominal damages are not considered; they are awarded upon entirely different theories.

[3] *Birmingham Ry., etc. Co.* v. *Hinton* (1908) 157 Ala. 630, 47 So. 576.

[4] See *ibid.* 632.

[5] *Kountz* v. *Kirkpatrick* (1872) 72 Pa. St. 376, an interesting case. *Cf. Suburban Land Co.* v. *Arlington* (1914) 219 Mass. 539, 107 N. E. 432; *Theiss* v. *Weiss* (1895) 166 Pa. St. 9, 31 Atl. 63.

[6] *Missouri K. & T. Ry. of Texas* v. *Dement* (Tex. Civ. App. 1909) 115 S. W. 635.

[7] *Mather* v. *American Express Co.* (1884) 138 Mass. 55.

[8] " . . . the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value." *Kountz* v. *Kirkpatrick, supra,* footnote 5, p. 387.

[9] *Chicago R. I. & P. Ry.* v. *Clement* (1909) 53 Tex. Civ. App. 143, 115 S. W. 664 (intrinsic value); *Washington Mills, etc. Co.* v. *Weymouth, etc. Ins. Co.* (1883) 135 Mass. 503; *Laurent* v. *Chatham Fire Ins. Co.* (N. Y. 1828) 1 Hall 41 (the last two cases were actions on fire policies; the actual or intrinsic value was to be found); *St. Louis I. M. & S. Ry.* v. *Weldon* (1913) 39 Okla. 369, 135 Pac. 8 (actual cash value); *Barker* v. *S. A. Lewis Storage & Transfer Co.* (1905) 78 Conn. 198, 61 Atl. 363 (value to the owner); *Idaho, etc. Ry.* v. *Columbia, etc.*

In so far as these expressions mean a value inherent in the thing itself, they are meaningless. It is elementary economic theory that value is only relative, and that "intrinsic value" and "inherent value" mean, strictly speaking, nothing.[10] But that does not signify that property which has no market price is valueless. A set of building plans[11] or a family portrait[12] are of value, but they cannot be said to have a market price. The courts will give the owner the "actual value to him."[13] The question is, how is such a value to be determined?

As set forth above, even in those cases where the "market price" rule is applied, the determination of the actual value is the end sought; the market price is only the evidential means utilized.[14] The court in the instant case, therefore, in saying that the plaintiff is entitled to actual value, has simply restated the theory of damages, without indicating how the plaintiff may proceed to prove the actual value, and without demarcating the limits within which evidence of value must be confined. The "market price" rule sets forth a sharply defined limit; in cases where the rule is inapplicable the courts have generally merely indicated the end to be reached, but have not furnished any guides to the practitioner as to the proper means of reaching the end. The same situation arises under fire policies such as the standard fire policies, which limit liability to the "actual cash value" of the property. "Actual cash value" when used in a fire policy has the same connotation as in the conversion cases. Thus, as in the latter case, if a "market price" can be established, *that* is evidence of the actual value.[15] Here again, however, if the market price does not accurately measure the loss, or if there is no market price, the courts simply say that the "actual value" is the measure.[16]

The same problem also seems to be raised in fixing the damages in eminent domain proceedings. In such cases the measure of damages is said to be "just compensation."[17] But "just compensation" is the end sought in all the cases

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Synod (1911) 20 Idaho 568, 119 Pac. 60 (condemnation proceedings—value to the owner); *cf. Bryan Co.* v. *Scurlock* (Iowa 1920) 180 N. W. 684, in which case the court found an intrinsic value for shares of stock differing from the market value.

[10] Taussig, *Principles of Economics* (1913) 116-17. The author points out the loose use of the phrase.

[11] *Supra*, footnote 7. [12] *Supra*, footnote 6. [13] *Supra*, footnotes 6 and 9.

[14] *Supra*, footnote 8. That "actual value" which is the measure of compensation, it is believed, is the so-called "exchange value" as distinguished from the "value in use," as these terms are used by economists.

[15] *Farmers' Mercantile Co.* v. *Insurance Co.* (1913) 161 Iowa 5, 21, 141 N. W. 447. The court said "Cash value . . . is its fair market value."

[16] *Laurent* v. *Chatham Fire Ins. Co., supra*, footnote 9; *Washington Mills, etc. Co.* v. *Weymouth, etc. Ins. Co. supra*, footnote 9. In these two cases almost identical circumstances of a peculiar nature led the court to deny that "relative value" (by which the court must have meant market price, since value is always relative) was the base for assessment of damages. Both cases based damages on actual cash value, or intrinsic value.

In *Stenzel v. Pennsylvania Fire Ins. Co.* (1903) 110 La. 1019, 35 So. 271, the sale value at auction was urged as a base for estimating damages. The court held that the fair value or intrinsic value was the measure. In *Teter* v. *Insurance Corp.* (1914) 74 W. Va. 461, 465, 82 S. E. 201, the court said that "the value of a building is hardly susceptible of exact ascertainment. Hence the necessity of resorting to indirect or circumstantial evidence." These decisions indicate that courts are sensible that realty generally has no "market price" in the sense that chattels very frequently have. In one way or another, they apply the "actual value" rule, which is, it is submitted, nothing more than a statement of the theory of compensatory damages, with an implied statement that the "indirect or circumstantial testimony" of the *Teter* case will be admitted to prove what this actual value is. Such testimony is, of course, excluded where the "market price" is deemed the test.

[17] The phrase "just compensation" is used generally in the constitutions of the various states. *E. g.*, N. Y. Const. (1846) art. 1, § 6. Hence its use in the cases. *E. g., New York Telephone Co.* v. *De Noyelles Brick Co.* (1913) 154 App. Div.

where damages are compensatory. If there is a market price, that is the only evidence admitted; *i. e.*, it is the measure.[18] Again, however, if the market price is an inaccurate measure,[19] or if there is no market price, the courts say the damages should be measured by the "actual value to the owner."[20] Thus the same ultimate fact is sought to be determined in conversion cases, in fire loss cases, and in eminent domain proceedings.[21]

As to the practical and important question, what evidence is admissible to establish actual value, the cases disclose some broad tendencies. Evidence as to cost, condition, or extent of deterioration, is admissible.[22] But it seems error to charge a jury in such a way as to indicate that these alone determine the damages.[23] Expert testimony as to value is admissible.[24] And it has even been held proper to put a question to the owner in the form, "What were the goods worth to you?" [25] But this has been held error in New York.[26] Elements of speculative character, such as possibilities for future increase in value, seem generally not to be allowed consideration, except in eminent domain proceedings. In such proceedings, however, such evidence is generally permitted, on the theory that an owner may show that value of his land which will result from its most productive use.[27]

A very interesting problem is presented where one party attempts to establish the actual value by introducing as evidence a contract made with a third party for the sale of the identical property. It has been held that this contract price is not the measure of damages.[28] A New York case, however, has held that it is the measure, but under circumstances so exceptional that the decision should be only hesitatingly used as authority.[29] It is submitted, however, that the contract price

845, 847, 139 N. Y. Supp. 748; *Brainerd* v. *State of New York* (1911) 74 Misc. 100, 104, 131 N. Y. Supp. 221.

[18] *Brainerd* v. *State of New York, supra,* footnote 17.

[19] In *Suburban Land Co.* v. *Arlington, supra,* footnote 5, there seems to have been a real market price, for suburban lots of almost identical characteristics were for sale. The market price, however, was established by "boom" methods, and the court held that the market price, therefore, could not be the measure of damage.

[20] *Idaho, etc. Ry.* v. *Columbia, etc. Synod, supra,* footnote 9.

[21] It is not attempted in this note to explore all the situations where market value sometimes becomes an inadequate measure of the loss.

[22] *Woonsocket, etc. Co.* v. *New York, etc. R. R.* (Mass. 1921) 131 N. E. 461 (replacement cost); *Murray* v. *Postal Telegraph & Cable Co.* (1911) 210 Mass. 188, 96 N. E. 316 (cost); *Denver S. P. & P. R. R.* v. *Frame* (1882) 6 Colo. 382 (cost); see *Wamsley* v. *Atlas Steamship Co.* (1900) 50 App. Div. 199, 63 N. Y. Supp. 761 (cost and condition), *rev'd* on other grounds, 168 N. Y. 533, 61 N. E. 896.

[23] *Barker* v. *S. A. Lewis Storage & Transfer Co., supra,* footnote 9.

[24] *Birmingham Ry. Light & Power Co.* v. *Hinton, supra,* footnote 3; *Pascal* v. *Chicago, R. I. & P. R. R.* (Iowa 1912) 139 N. W. 279 (*semble*); *St. Louis, I. M. & S. Ry.* v. *Weldon, supra,* footnote 9.

[25] *Southern National Ins. Co.* v. *Wood* (1910) 63 Tex. Civ. App. 319, 133 S. W. 286; see *Missouri, etc. Ry.* v. *Dement, supra,* footnote 6, p. 637.

[26] *Prignitz* v. *McTiernan* (1896) 18 Misc. 651, 43 N. Y. Supp. 974. The form of the question was such that it might have permitted an estimate based on merely sentimental value. Damages based on *pretium affectionis* are not permitted. *Louisville & N. R. R.* v. *Stewart* (1901) 78 Miss. 600, 29 So. 394. The ruling, therefore, excludes a question which is at best ambiguous. But where the owner is merely asked to give his opinion as to the value of the goods, he may testify thereto. *Birmingham Ry., etc. Co.* v. *Hinton, supra,* footnote 3. The question should be couched so as to exclude the possibility of basing the estimate on sentimental value.

[27] *New York Telephone Co.* v. *De Noyelles Brick Co., supra,* footnote 17.

[28] *Woonsocket, etc. Co.* v. *New York, etc. R. R., supra,* footnote 22; *cf. Detroit Fire & Marine Ins. Co.* v. *Boren-Stewart Co.* (Tex. Civ. App. 1918) 203 S. W. 382.

[29] *Phillips* v. *Home Insurance Co.* (1908) 128 App. Div. 528, 112 N. Y. Supp. 769.

should be accepted as the measure, especially in a case where the defendant can show that the plaintiff is under contract to sell at a price lower than the actual value is claimed to be. In such a case the plaintiff has only lost, in contemplation of law, his contract price, and awarding him that would be exact compensation. It has been held, even in such a case, that the contract price is not the measure.[30] If the contract price is such that it might have been foreseen or if the defendant had actual notice, then there is no objection to the use of this sale price as a measure.[31] The law of sales has found no difficulty in adopting a somewhat similar rule in measuring damages where there is a breach of contract in failing to accept goods not readily marketable.[32] It is conceivable, however, that the price may be so favorable that it would be unjust to force the defendant to recompense the plaintiff for an injury which the former could not possibly have foreseen. In such a case it is proper to apply the actual value rule, *i. e.*, determine the compensation by some extrinsic, collateral evidence.[33] This, of course, disregards the actual loss suffered by the injured party, but it is in harmony with the ordinary rules of measuring compensation, in that the defendant is not held accountable for a loss he could not have foreseen, or for a loss which is not "proximate."

Chattels have as a rule a market price, and, therefore, the problem of determining the actual value by evidence other than the market price arises comparatively seldom. The "actual value" doctrine, however, assumes real importance in both the fire policy cases, and in condemnation proceedings. Realty usually has no market in the sense in which that word is generally accepted. Ordinarily the sale price of realty is fixed only after lengthy negotiations, and seldom are parcels so alike that a price can be said at any time to be the market price for that particular kind of land. It is of the utmost importance in such cases to appreciate the real meaning and limitations of such phrases as "just compensation" and "actual value." It is submitted that the courts by the use thereof are only setting forth the ultimate fact to be found, and not, as the language leads one to believe, a measure of damages based on a value inherent in the thing itself. There is, therefore, no need for a practitioner to search for the essence of value, but he may more profitably search for evidence which will legally afford a means of measuring compensation due.

THE EFFECT OF CURATIVE LEGISLATION.—Retroactive state legislation, unless it impairs the obligation of a contract, or is a violation of due process, or is *ex post facto,* is constitutional; but even in the absence of express constitutional inhibitions,[1] and though so clearly worded that courts cannot construe it as prospective,[2] such legislation sometimes fails to accomplish the very purpose for which it was enacted. In the recent case of *People ex rel. Sprague* v. *Clark* (Ill.

[30] *Detroit Fire & Marine Ins. Co.* v. *Boren-Stewart Co., supra,* footnote 28.
[31] *Cf. Hadley* v. *Baxendale* (1854) 9 Exch. 341.
[32] See Uniform Sales Act § 63(3); (1922) 22 COLUMBIA LAW REV. 51.
[33] The analogy of such a rule to the ordinary one which uses market price as the base for damages, and which rejects market price only when it becomes an inaccurate measure, is evident.

[1] Express prohibitions are contained in the constitutions of Colorado, Georgia, Missouri, New Hampshire, Ohio, Tennessee, and Texas. Ohio, however, excepts curative acts passed to carry out the intentions of parties and officers, Art. II, § 28, and some other states reach the same result by construction. *Shields* v. *Clifton Co.* (1894) 94 Tenn. 123, 28 S. W. 668; *Mills* v. *Geer* (1900) 111 Ga. 275, 36 S. E. 673.
[2] " . . . the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless com-